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No. _____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1993

DOUGLAS LACHANCE,

Petitioner,

v.

JANET RENO, IN HER CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, and the UNITED STATES PAROLE COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the United States Parole Commission exceed its authority by implementing a regulation, 28 C.F.R. § 2.52(c)(2), which contradicts the plain language of the statute, 18 U.S.C. § 4210(b)(2), which it purports to implement?

2. Where a statute has the power to deprive an individual of liberty, and where Courts of Appeals have acknowledged that statute to be ambiguous, is it proper to defer to an administrative agency's interpretation of that statute or should the rule of lenity be applied?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption.

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DOUGLAS LACHANCE,

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JANET RENO, IN HER CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, and the UNITED STATES PAROLE COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Douglas LaChance respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on February 4, 1994.

OPINIONS BELOW

The decision of the Second Circuit Court of Appeals is reported at 13 F.3d 586 (2d Cir. 1994), and is reprinted at Appendix A,1. The order denying a rehearing is reprinted at Appendix B,1. The opinion of the District Court is reported in LaChance v. Barr, 812 F. Supp. 434 (S.D.N.Y. 1993), and is reprinted at Appendix C,1.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on January 7, 1994, and a timely petition for rehearing was denied on February 4, 1994. The jurisdiction of this Court arises under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved is 18 U.S.C. § 4210 and is set out, in pertinent part, in Appendix D,1.

REGULATION INVOLVED

The regulation involved is 28 C.F.R. § 2.52 and is set out, in pertinent part, in Appendix E,1.

STATEMENT OF THE CASE

In March, 1981, LaChance went to federal prison to begin serving a 12-year sentence. He served four years and nine months in prison and, in 1985, began a parole term with seven years and three

months until the expiration of his maximum term. In late 1992, with all but three months of his 12-year term served, the Parole Commission found, after a parole revocation hearing, that LaChance had used cocaine and committed other parole violations. The Parole Commission thereupon revoked LaChance's parole and ordered him held in prison.

The Parole Commission decided that none of the time that LaChance had already served on parole (seven years) should be credited toward service of his 12-year sentence because, in 1988, LaChance had been convicted of careless driving. Additionally, the Parole Commission ordered LaChance incarcerated for an additional eight months. The Parole Commission took this action despite having been aware of LaChance's conviction for careless driving since

1988. At the time of the 1988 conviction, the Parole Commission only issued LaChance an official letter of reprimand, and did not seek revocation of his parole.

The Parole Commission's decision extended LaChance's maximum term from March, 1993 to approximately March, 2000, and kept LaChance in prison more than three months beyond his maximum term. Thus, based on a $50 traffic infraction that the Parole Commission had already treated as a minor matter, the Parole Commission extended LaChance's sentence literally into the next century.

The Present Action

LaChance commenced this action by filing a petition for a writ of habeas corpus. On June 7, 1993, the United States District Court for the Southern District of New York denied LaChance's

petition for a writ of habeas corpus. The district court held that (1) 18 U.S.C. § 4210(b)(2) and the regulation thereunder, 28 C.F.R. § 2.52(c)(2), gave the Parole Commission statutory authority to extend LaChance's maximum term on account of the careless driving conviction and (2) the Parole Commission's action did not offend due process. The district court, however, permitted LaChance to remain on bail pending the appeal of its decision.

On January 7, 1994, the Second Circuit Court of Appeals affirmed the district court's decision. LaChance then filed a petition for rehearing which was denied on February 4, 1994.

REASONS FOR GRANTING THE WRIT

A. The enactment and enforcement of 28 C.F.R. § 2.52(c)(2) is invalid because it contradicts 18 U.S.C. § 4210(b)(2).

It is indisputable that a regulation promulgated by an executive agency, like the one currently in dispute, must be consistent with the legislative statute under which it was promulgated. See United States v. Vogel Fertilizer Co., 455 U.S. 16 (1982)(holding that a Treasury regulation was invalid because it was not a reasonable interpretation of the relevant statute). Moreover, this Court has repeatedly emphasized the importance of interpreting the meaning of a statute by analyzing the specific language of the statute. See Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985); United States v. Turkette, 452 U.S. 576, 580 (1981). This Court has

held that courts must assume that Congress intended the words of a statute to have their ordinary meaning. See Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 47 (1989); INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987). Here, 18 U.S.C. § 4210(b)(2) provides:

> Except as otherwise provided in this section, the jurisdiction of the Commission over the parolee shall terminate no later than the date of the expiration of the maximum term or terms for which he was sentenced, except that --
>
> . . .
>
> (2) in the case of a parolee who has been convicted of a Federal, State, or local crime committed subsequent to his release on parole, and such crime is punishable by a term of imprisonment, detention or incarceration in any penal facility, the Commission shall determine, in accordance with the provisions of section 4214(b) or (c), whether all or any part of the unexpired term being served at the time of parole shall run concurrently

> or consecutively with the sentence imposed for the new offense . . . . (emphasis added).

In this case, there was no "sentence imposed" on LaChance for his 1988 careless driving conviction. Hence, the statute does not empower the Parole Commission to decide that LaChance shall get no credit toward service of his sentence for the time he has served on parole. The statutory language is clear and should be applied as written. See, e.g., West Virginia Univ. Hosps., Inc. v. Casey, 111 S. Ct. 1138, 1146-47 (1991).

In its arguments before the district court and the Second Circuit, the Parole Commission relied on a regulation, 28 C.F.R. § 2.52(c)(2), which provides:

> A parolee whose release is revoked by the Commission will receive credit on service of his sentence for time spent under supervision, except as provided below:

. . .

> (2) It is the Commission's interpretation of 18 U.S.C. 4210(b)(2) that, if a parolee has been convicted of a new offense committed subsequent to his release on parole, which is punishable by any term of imprisonment, detention, or incarceration in any penal facility, forfeiture of time from the date of such release to the date of execution of the warrant is an automatic statutory penalty, and such time shall not be credited to the service of the sentence. An actual term of confinement or imprisonment need not have been imposed for such conviction; it suffices that the statute under which the parolee was convicted permits the trial court to impose any term of confinement or imprisonment in any penal facility . . . . (emphasis added).

The language of the regulation, which provides that an actual term of imprisonment need not be imposed, contradicts the statute which expressly speaks of the "sentenced imposed." With respect to a parolee who is convicted of

a new crime punishable by imprisonment, the statute, 18 U.S.C. § 4210(b)(2), authorizes the Parole Commission to determine whether the unexpired parole term "shall run concurrently or consecutively with the sentence imposed for the new offense. . . ." (Emphasis added.) The statute says nothing about "forfeiture" of time spent on parole as an "automatic statutory penalty," the language of the regulation. The Parole Commission cannot acquire by regulation authority that it does not have by statute. See Booze v. Thomas, 500 F. Supp. 327, 330-31 (S.D.N.Y. 1980).

"Statutory interpretation is, in the final analysis, a matter for the courts." Rosario v. INS, 962 F.2d 220, 222 (2d Cir. 1992). If the Parole Commission's action is not authorized by the statutory language of 18 U.S.C. § 4210 (b)(2),

deference to the Parole Commission's regulation is inappropriate. See id. at 222-23; Fort Stewart Sch. v. FLRA, 495 U.S. 641, 645 (1990); New York City Health and Hosps. Corp. v. Perales, 954 F.2d 854, 858 (2d Cir.), cert. denied, 113 S. Ct. 461 (1992). Here, section 4210(b)(2) merely authorizes the Commission to "determine . . . whether" the unexpired term "shall run concurrently or consecutively with the sentence imposed" for the new offense. In the context of this statute, the word "sentence" must refer to a sentence of imprisonment or other confinement. See generally, Smith v. United States, 113 S. Ct. 2050, 2054 (1993). Otherwise, the statute's direction that the Commission determine whether the unexpired term shall "run concurrently or consecutively" with the sentence imposed for the new

offense would be either nonsensical or superfluous. See Black's Law Dictionary at 1362 (6th ed. 1990). A statute should not be interpreted so as to render a portion of it nonsensical or superfluous. See, e.g., Adams Fruit Co. v. Barrett, 494 U.S. 638, 645 (1990) (court should "giv[e] effect to the meaning and placement of the words chosen by Congress"); Rodriguez v. Cuomo, 953 F.2d 33, 39 (2d Cir. 1992)(each portion of a statute "must mean something").

Nor does the legislative history justify the Parole Commission's "interpretation" of section 4210(b)(2). The House Conference Report provides:

> [A]n individual whose parole has been revoked upon conviction of any new criminal offense that is punishable by a term of detention, incarceration or imprisonment in any penal institution shall receive no credit for service of his sentence from the day he is released on parole until he

> either returns to Federal custody following completion of any sentence of incarceration or upon the Commission determining that the sentence run concurrently with any new sentence that may have been imposed . . . .
>
> The phrase "punishable by a term of imprisonment, detention or incarceration in a penal facility" is intended by the Conferees to mean any term of confinement which may be levied upon adjudication of guilt or delinquency and does not include detention prior to adjudication. For example, a person convicted of any offense punishable by even one day of imprisonment would not automatically receive credit toward service of his sentence, even if no sentence of imprisonment was imposed.

H.R. Conf. Rep. No. 838, 94th Cong., 2d Sess. 32 (1976), reprinted in 1976 U.S.C.C.A.N. 335, 364 (emphasis added). The first paragraph quoted above clearly states that a parolee may be denied credit for time served on parole only upon the "completion of any sentence of incarceration" or upon a determination

that the sentence run concurrently with a "new sentence imposed . . . ."

The Second Circuit relied on the second paragraph quoted above in holding the regulation "reasonable." (A-6.) A court, however, should be "loathe to place much reliance on this isolated bit of legislative history." FLRA v. United States Dep't of Veterans Affairs, 958 F.2d 503, 513 (2d Cir. 1992). This is particularly true where, as here, one paragraph of a congressional report conflicts with the next.

B. The rule of lenity must be applied in interpreting a statute which can be used to deprive an individual of liberty.

At the very least, after considering the statutory language and the relevant regulation, there remains substantial ambiguity as to whether the Parole Commission has the authority which it has

exercised here. Indeed, the Second Circuit's opinion expressly acknowledges that section 4210(b)(2) is ambiguous. (See A-5.)[1]

Under longstanding principles of lenity, such ambiguity must be resolved in favor of LaChance. Hughey v. United States, 495 U.S. 411, 422 (1990); Crandon v. United States, 494 U.S. 152, 158 (1990); United States v. Kozminski, 487 U.S. 931, 952 (1988); United States v.

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[1] The Second Circuit expressly relies on the Seventh Circuit's decision in United States ex rel. Del Genio v. U.S. Bureau of Prisons, 644 F.2d 585 (7th Cir. 1980), cert. denied, 449 U.S. 1084 (1981), in its opinion. The Second Circuit notes that "[t]he Court in DelGenio first noted that section 4210(b)(2) is ambiguous." (See A-5.) Thus, the Seventh Circuit has also found the statute to be ambiguous. As set forth in part A, supra, it is LaChance's position that the statute is not ambiguous, but rather that it contradicts the regulation implemented by the Parole Commission. However, if the statute is found to be ambiguous, as two Courts of Appeals have found, it must be construed in LaChance's favor.

Litchfield, 986 F.2d 21, 22 (2d Cir. 1993) (per curiam); United States v. McKeithen, 822 F.2d 310, 315 (2d Cir. 1987); see also United States v. R.L.C., 112 S. Ct. 1329, 1338 (1992) (rule of lenity applies "to answer questions about the severity of sentencing") (plurality); Simpson v. United States, 435 U.S. 6, 14-15 (1978) (rule of lenity applied to federal statute which operates to enhance a penalty). Given the statute's language and legislative history, as well as the rule of lenity, the Parole Commission's regulation cannot be upheld as a reasonable interpretation of an ambiguous statute. See Rosario v. INS, supra, 962 F.2d at 225.

The application of the rule of lenity is an issue which transcends this immediate case. The appropriate

application of this rule is important in all sentencing contexts.

CONCLUSION

The United States Parole Commission exceeded its authority by implementing a regulation, 28 C.F.R. § 2.52(c)(2), which plainly contradicts the statute, 18 U.S.C. § 4210(b), it purports to implement. Additionally, where a statute has the power to deprive an individual of liberty, and where Courts of Appeals have acknowledged that statute to be ambiguous, it is improper to defer to an administrative agency's interpretation of

the statute; rather the rule of lenity should be applied.

Dated: May 3, 1994

Respectfully submitted,

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EDITOR'S NOTE

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 560—August Term 1993

Argued: November 9, 1993 Decided: January 7, 1994

Docket No. 93-2438

DOUGLAS LACHANCE,

Petitioner-Appellant,

—v.—

JANET RENO, IN HER CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, and the UNITED STATES PAROLE COMMISSION,

Respondents-Appellees.

Before:

NEWMAN, *Chief Judge,*
CARDAMONE and GOODWIN,* *Circuit Judges.*

Appeal from the judgment of the United States District Court for the Southern District of New York (Louis L.

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* The Honorable Alfred T. Goodwin of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

Stanton, Judge) denying plaintiff's petition for a writ of habeas corpus.

Affirmed.

KENNETH A. CARUSO, New York, N.Y. (Andrew W. Feinberg, John Gueli, Shearman & Sterling, New York, N.Y., on the brief), *for petitioner-appellant*.

ALLAN N. TAFFET, Asst. U.S. Atty., (Mary Jo White, U.S. Atty., Gabriel W. Gorenstein, Asst. U.S. Atty., New York, N.Y., on the brief), *for respondents-appellees*.

GOODWIN, *Circuit Judge*:

Douglas LaChance appeals from the judgment of the District Court for the Southern District of New York (Louis L. Stanton, Judge) denying his petition for a writ of habeas corpus. The District Court held that the United States Parole Commission had authority to extend LaChance's custodial time by ordering forfeiture of his seven years of "street time" (his time served on parole) because of his violation of the terms of his parole. We affirm.

In May 1980, LaChance, a *New York Times* delivery truck driver who was then President of the Newspaper and Mail Deliverers' Union, was convicted of extortion, federal income tax evasion, and racketeering. He was sentenced to 12 years in prison, and began serving his sentence in 1981. After serving nearly five years,

LaChance was released from custody to begin a term of parole on December 20, 1985.

In late 1992, with just three months of his 12-year term remaining, the Parole Commission found, after a parole revocation hearing, that LaChance had used cocaine and committed other parole violations. The Commission revoked his parole, ordered his street time of seven years forfeited, and ordered him to prison with anticipated reparole after eight months, to be followed by parole supervision with a special drug aftercare condition.

The Commission based its action on LaChance's 1988 conviction on state charges of careless driving and refusing to submit to a breathalyzer test. In that case, LaChance faced a maximum jail term of 15 days on the careless driving charge, but received no custodial sentence. He was fined $250 for careless driving and $50 for refusing the breathalyzer test. The Parole Commission did not revoke LaChance's parole immediately following the 1988 conviction, but did issue a "Letter of Reprimand," which warned him that "continued disrespect and noncompliance with your conditions of release will result in your arrest and your return to federal custody."

LaChance now makes a "jury" argument that the Parole Commission waited until the eve of the expiration of his sentence, when he had served 11 years and nine months (98 percent) of his 12-year term, to announce that seven years spent on parole was forfeited due to a four-year-old careless driving conviction. He fails to mention, however, that the parole officers had become aware that LaChance had been deceiving them for years about his continued substance abuse problem. Even as late as February 1992, upon questioning by his parole officer, LaChance denied any personal use of cocaine. As the District Court noted,

"Had Mr. LaChance's (even then long-standing) abuse of cocaine been known to the Commission at the time of the 1988 conviction, the Commission could have revoked his parole then. . . . It was deprived of its ability to respond flexibly and knowledgeably by Mr. LaChance's continuing concealment of the facts."

In any event, this appeal does not turn on the equities of the particular parolee, but on the legal question whether the Commission's actions exceeded its authority and violated due process. The Parole Commission relies on a federal regulation as authority for its ability to compel forfeiture of Appellant's time served on parole. In pertinent part, 28 C.F.R. § 2.52(c)(2) provides that:

> (c) A parolee whose release is revoked by the Commission will receive credit on service of his sentence for time spent under supervision, except as provided below:
>
> . . . .
>
> (2) It is the Commission's interpretation of 18 U.S.C. 4210(b)(2) that, if a parolee has been convicted of a new offense committed subsequent to his release on parole, which is punishable by any term of imprisonment, detention, or incarceration in any penal facility, forfeiture of time from the date of such release to the date of execution of the warrant is an automatic statutory penalty, and such time shall not be credited to the service of the sentence. *An actual term of confinement or imprisonment need not have been imposed for such conviction*; it suffices that the statute under which the parolee was convicted permits the trial court to impose any term of confinement or imprisonment in any penal facility. . . . (emphasis added)

LaChance contends that this regulation exceeds the power of the Commission in interpreting the statute. He points out that the statute, 18 U.S.C. § 4210(b)(2) (1988), merely authorizes the Commission to "determine . . . whether all or any part of the unexpired term being served at the time of parole shall run concurrently or consecutively with the *sentence imposed* for the new offense" (emphasis added). He argues that his careless driving offense cannot serve as the basis for forfeiture of his street time under the literal terms of the statute because no sentence of imprisonment was imposed on him for the offense, even though it was "punishable by a term of imprisonment."

Although we have not previously encountered this precise argument, it was rejected by the Seventh Circuit in *United States ex rel. Del Genio v. U.S. Bureau of Prisons*, 644 F.2d 585, 588 (7th Cir. 1980), *cert. denied*, 449 U.S. 1084 (1981). The Court in *Del Genio* first noted that section 4210(b)(2) is ambiguous. While the portion quoted by the petitioner refers to "the *sentence imposed* for the new offense," the opening clause of subparagraph (b)(2) indicates that the Parole Commission may impose forfeiture of street time upon "a parolee who has been convicted of any criminal offense . . . *punishable* by a term of imprisonment . . . ." 18 U.S.C. § 4210(b)(2) (emphasis added). Where we are presented with such ambiguity in a statute, we must defer to the Parole Commission's reasonable interpretation. *See Del Genio*, 644 F.2d at 588 (noting that if a statute is ambiguous, it is "appropriate to give some deference to the agency charged with interpreting the Act.").

This treatment accords with our avowal that "under the Parole Act, the Parole Commission is given broad latitude . . . to implement the parole statutes." *Weeks v.*

Quinlan, 838 F.2d 41, 44 (2d Cir. 1988). In *Weeks*, we said that if a statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. "The cases teach that an agency's interpretation of a statute need not be the only reasonable one, or even the one the court would have adopted if the question had initially arisen in a judicial proceeding. . . . Indeed, for the agency interpretation to be accepted, it need only be shown that it is 'sufficiently reasonable.' " *Id.* (citing *Federal Election Comm'n v. Democratic Senatorial Campaign Comm'n*, 454 U.S. 27, 39 (1981)).

The Parole Commission's interpretation of the statute to mean that forfeiture may be imposed for an imprisonable offense, even where no sentence of imprisonment has been imposed, is not only "sufficiently reasonable," but consistent with the intent of Congress. The conference committee report on section 4210(b) stated:

> The phrase "punishable by a term of imprisonment, detention or incarceration in a penal facility" is intended by the Conferees to mean any term of confinement which may be levied upon adjudication of guilt or delinquency and does not include detention prior to adjudication. For example, a person convicted of any offense punishable by even one day of imprisonment would not automatically receive credit toward service of his sentence, *even if no sentence of imprisonment was imposed.*

H.R. Rep. No. 94-838, 94th Cong., 2d Sess. 32 (1976), *reprinted in* 1976 U.S.C.C.A.N. 335, 364 (emphasis added). The conference committee's hypothetical, indicating that forfeiture is permissible even where no sentence of confinement has been imposed for an

imprisonable offense, is precisely the situation presented in the case at bar. Because the Parole Commission has discretion to determine "whether all or any part of the unexpired term being served at the time of parole shall run concurrently or consecutively" with the new sentence, the Commission has de facto authority to decide whether to compel forfeiture. The Parole Commission therefore acted within its discretion by ordering the petitioner to forfeit his street time, even though no new sentence of confinement was imposed for the imprisonable offense of careless driving.

Our decision today upholding 28 C.F.R. § 2.52(c)(2) is not only consistent with the Seventh Circuit's holding in *Del Genio*, but also with our own precedents and those of other courts. This Circuit has twice cited 28 C.F.R. § 2.52(c)(2) with approval. *See D'Amato v. U.S. Parole Comm'n*, 837 F.2d 72, 78 (2d Cir. 1988); *Miller v. Hadden*, 811 F.2d 743, 747 (2d Cir. 1987). Other courts have also upheld the forfeiture of a parolee's street time following a conviction after release. *See Harris v. Day*, 649 F.2d 755, 758-60 (10th Cir. 1981) (street time forfeitable under § 4210); *United States ex rel. Stanbridge v. Quinlan*, 595 F. Supp. 1145, 1148-50 (S.D.N.Y. 1984) (street time forfeitable notwithstanding repeal of § 4205). The forfeiture of so-called street time in appropriate cases has grown up as a practice deemed essential by the Parole Commission to make the system work. Parole is a form of conditional release, with freedom contingent upon good behavior and a demonstrated effort to serve the rehabilitative purposes of parole. The courts have upheld the forfeiture of interim periods of conditional release when the condition has been broken.

Indeed, the petitioner's proposed reading of the statute could produce bizarre results if two persons on parole

with substantially identical criminal histories were both convicted of the same new crime while on parole. One could receive a custodial sentence and the other could receive a fine or a sentence of community service. The first parolee would be subject to having his street time forfeited, and the second would not. To construe a statute to produce such a result would not advance the purposes of the parole system.

LaChance next argues that even if the Commission has the authority to extend his original maximum term by ordering forfeiture of his parole time, it lost that authority by failing to give him notice of the danger of forfeiture and waiting too long to act.

In *Miller v. Hadden*, 811 F.2d 743, (2d Cir. 1987), we rejected a similar argument by a prisoner who claimed that he did not receive notice that revocation of his parole could result in forfeiture of street time. *Id.* at 744. The *Miller* Court found that a specific warning about street-time forfeiture was not required because the forfeiture provision in 28 C.F.R. § 2.52(c)(2) was part of a "published regulation." *Id.* at 747. The courts have not required renewed warning. A parolee is on constructive notice of the consequences of violation by the Parole Commission's published regulation. LaChance's notice argument does not entitle him to relief.

Finally, LaChance argues that the Parole Commission was barred from relying on his careless driving conviction to revoke his street time because, he alleges, this conviction was not the basis of the parole revocation. We have ruled that "[a] conviction that is not the basis of a [parole] violation cannot be used to . . . deny a parolee credit for the time spent on parole." *See Toomey v. Young*, 449 F. Supp. 336, 340 (D. Conn. 1978), *aff'd on opinion*

of District Court, 589 F.2d 123 (2d Cir. 1979). The application for LaChance's parole revocation warrant listed "Driving while Intoxicated" and "Refusal to Submit a Breath test" as the specifications of the first charge of parole violation, whereas the "Careless Driving" charge was the only one that both resulted in a conviction and was punishable by imprisonment.

However, immediately under the two listed charges, the application recited that LaChance had pled guilty to "Careless Driving" and "Refusal to Submit a Breath Test." Since the "Careless Driving" charge was thus mentioned in the warrant application, was based on the same episode that had given rise to the listed charges, and was obviously substituted in the state court to afford LaChance the benefit of a plea bargain, we are satisfied that this charge was sufficiently the "basis" of the parole revocation within the meaning of *Toomey*. *See United States ex rel. Pihakis v. Thomas*, 488 F. Supp. 462, 465 (S.D.N.Y. 1980) (distinguishing *Toomey* on ground that added charge in that case was unrelated to charge filed within supervision period).

The judgment of the District Court is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of February on[e] thousand nine hundred and ninety four.

Present:

Hon. Jon O. Newman, Chief Judge.,

Hon. Richard J. Cardamone,

Hon. Alfred T. Goodwin,*

CIRCUIT JUDGES,

DOUGLAS LACHANCE,
Petitioner-Appellant,

v.

JANET RENO, in her capacity as Attorney General of the UNITED STATES; and the UNITED STATES PAROLE COMMISSION,
Respondents-Appellees.

A petition for rehearing having been filed herein by appellant, pro se, Douglas LaChance,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

APPENDIX C

DOUGLAS LACHANCE,

Plaintiff,

-against-

JANET RENO, in her capacity as Attorney General of the United States, and the UNITED STATES PAROLE COMMISSION,

Defendants.

92 Civ. 8870 (LLS)

United States District Court,
S.D. New York

OPINION AND ORDER

Douglas LaChance petitions for a writ of habeas corpus, arguing that the United States Parole Commission improperly forfeited the time he served on parole.

BACKGROUND

In 1981, LaChance commenced service of a 12-year term for extortion, racketeering and tax evasion. At the time of his sentencing, LaChance denied alcohol or opiate abuse. (Declaration of United States Probation Officer Eileen Kelly ¶ 4). After serving nearly five years, on December 20, 1985 he was

released to parole supervision.

While on parole LaChance pleaded guilty in Cape May, New Jersey in 1988 to careless driving and refusing to take a breath test. Although he could have been jailed for 15 days, he was fined $300. Believing this incident was "an isolated one of poor judgment," the United States Parole Commission (the "Commission") did not revoke LaChance's parole, but instead sent him a letter of reprimand.[1] (Kelly

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[1]The letter provides:
The purpose of this letter is to inform you that the US Parole Commission has received information concerning your non-compliance with the conditions of your parole release.

Official records indicate that you were paroled on 12/20/85, at which time you signed the Conditions of Release indicating that you understood them and would abide by them when you were released. The Commission has been informed that you are in violation of these conditions; specifically:

(1) You shall not violate any law as evidenced by your guilty plea before the Cape May, New Jersey Municipal Court on 1/12/88 to the charges of Careless Driving and Refusal to Submit to a Breath Test.

Violation of the conditions of release may
(continued...)

Decl. ¶ 8).

In December 1991, New York State law enforcement agents advised LaChance's probation officer that LaChance had been identified by a confidential informant as a cocaine supplier and possible user. When confronted with news of the informant's tip, LaChance denied any involvement in drug purchases or drug use. On July 9th, July 28th, August 18th and September 2nd of 1992, however, LaChance tested positive for cocaine use.

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[1](...continued)
result in the issuance of a warrant for your arrest. Your disregard of the rules and regulations set fourth on your release certificate and by your US Probation Officer will no longer be tolerated. USPO Schramm has requested that we not issue a warrant at this time but rather address to you an Official Letter of Reprimand.

The Commission has reviewed your case and has agreed with your Probation Officer. However, you are officially notified that continued disrespect and non-compliance with your condition of release will result in your arrest and return to federal custody. Your Probation Officer has received a copy of this letter and will inform us immediately should any further violations occur.

He agreed to seek drug treatment, but failed to keep required appointments.

In October 1992, LaChance was served with a summons to appear at a hearing concerning charges that he violated the terms of his parole. LaChance, who had in the meantime entered Conifer Park Mediplex, a detoxification and long-term treatment agency in Conifer Park, New York, failed to appear at the hearing. Later that month, his probation officer received information that LaChance had left the Conifer Park facility: on October 22, he was arrested and was re-imprisoned for violating the conditions of his parole. According to LaChance's probation officer, at his subsequent revocation hearing LaChance acknowledged that he had been using cocaine for fifteen years. (Kelly Decl. ¶ 11). In papers on this application, LaChance

acknowledges that during the 1970s and while on parole he used cocaine "occasionally." (Reply Affidavit of Douglas LaChance sworn to June 3, 1993 ¶ 1).

On January 7, 1993, the Commission adopted a hearing officer's recommendations to revoke LaChance's parole, forfeit the entire time he had spent on parole, and thus extend his release date from February 18, 1993 to the year 2000. The Commission's action imposes eight months of imprisonment to be followed by parole supervision with a special drug aftercare condition.[2] On February 18, 1993, the expiration of his original maximum term, this court directed that LaChance be released on

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[2]LaChance already has served roughly four months of the eight month prison term. He served from October 22, 1992, when he was re-imprisoned for violating the conditions of his parole, until February 18, 1993, when he was released on bail pending his administrative appeal.

bail pending the outcome of his administrative appeal. LaChance v. Barr, 812 F. Supp. 436 (S.D.N.Y. 1993). On March 3, 1993, the Commission affirmed its prior decision. This application for a writ of habeas corpus, more fully briefed and factually supported than the application for bail, followed.

The Commission charges LaChance with his positive test for cocaine, refusal to participate in a drug program, failure to appear at a hearing/interview, and leaving the district without permission (all of which occurred in 1992) and the 1988 conviction described above. Of those violations, only the 1988 conviction could serve as a basis for forfeiting LaChance's whole time of almost seven years on parole, see 18 U.S.C. § 4210 (b) (2). LaChance asserts that this forfeiture violates due

process.

DISCUSSION

LaChance argues that the Commission has no power to extend its jurisdiction over him past his original maximum term on the basis of the 1988 conviction. He contends that under 18 U.S.C. § 4210(b)[3] the Commission has only the power to determine whether an unexpired parole

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[3]18 U.S.S.C. § 4210(b) (2) provides:
(b)Except as otherwise provided in this section, the jurisdiction of the Commission over the parolee shall terminate no later than the date of the expiration of the maximum term or terms for which he was sentenced, except that

(2)in the case of a parolee who has been convicted of a Federal, State, or local crime committed subsequent to his release on parole, and such crime is punishable by a term of imprisonment, detention or incarceration in any penal facility, the Commission shall determine, in accordance with the provisions of section 4214(b) or (c), whether all or any part of the unexpired term being served at the time of parole shall run concurrently or consecutively with the sentence imposed for the new offense, but in no case shall such service together with such time as the parolee has previously served in connection with the offense for which he was paroled, be longer than the maximum term for which he was sentenced in connection with such offense.

term should run concurrently or consecutively with the sentence imposed for a new offense. He argues that because he was not imprisoned for his 1988 conviction, the Commission may not hold him past his maximum term. He claims that the regulation codified in 28 C.F.R. § 2.52(c)(2),[4] which does not

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[4]28 C.F.R. § 2.52(c) (2) provides:
(c) A parolee whose release is revoked by the Commission will receive credit on service of his sentence for time spent under supervision, except as provided below:

(2) It is the Commission's interpretation of 18 U.S.C. 4210(b) (2) that, if a parolee has been convicted of a new offense committed subsequent to his release on parole, which is punishable by any term of imprisonment, detention, or incarceration in any penal facility, forfeiture of time from the date of such release to the date of execution of the warrant is an automatic statutory penalty, and such time shall not be credited to the service of the sentence. An actual term of confinement or imprisonment need not have been imposed for such conviction; it suffices that the statute under which the parolee was convicted permits the trial court to impose any term of confinement or imprisonment in any penal facility.
(The "warrant" referred to in the first sentence quoted above is the warrant for revocation of his parole, not the warrant for his arrest on the new offense. See
(continued...)

require an "actual term of confinement or imprisonment" before a conviction may be used to forfeit parole time, is inconsistent with the statute.

In order for the Commission's interpretation of the statute to be valid, "it need only be shown that it is 'sufficiently reasonable.'" Weeks v. Quinlan, 838 F.2d 41, 44 (2d Cir. 1988) (citations omitted). The interpretation does not have to be "the only reasonable one, or even the one the court would have adopted if the question had initially arisen in a judicial proceeding." Id. In United States ex rel. Del Genio v. United States Bureau of Prisons, 644 F.2d 585, 588 (7th Cir. 1980), cert. denied, 449 U.S. 1084, 101 S. Ct. 870 (1981), the

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[4](...continued)
Munguia v. United States Parole Commission, 871 F.2d 517, 521 (5th Cir. 1989), cert. denied, 493 U.S. 856, 110 S. Ct. 161 (1989)).

Court of Appeals for the Seventh Circuit found that § 4210(b) was ambiguous, and that the Commission's interpretation was consistent with the intent of Congress. There are strong indications, in fact, that the drafters intended to treat parole violations punishable by imprisonment, detention or incarceration in any penal facility[5] as grounds for the forfeiture of street time, regardless of whether such a sentence is actually imposed. According to the Conference Report:

> The phrase 'punishable by a term of imprisonment, detention or incarceration in a penal facility' is intended by the Conferees to mean any term of confinement which may be levied upon adjudication of guilt or delinquency and does not include detention prior to adjudication. For example, a

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[5]"Penal Facility" includes a county jail. See Rose v. J.R. Johnson, 563 F. Supp. 801, 802 (E.D. Mich. 1983) (offense punishable by 90 days in county jail is within the meaning of 18 U.S.C. § 4210(b) (2)).

> person convicted of any offense punishable by even one day of imprisonment would not automatically receive credit toward service of his sentence, even if no sentence of imprisonment was imposed.

H.R.Rep. No. 94-838, 94th Cong., 2d Sess. 31-32 (1976) reprinted in U.S. Code Cong. & Admin. News, pp. 335, 364.

Because the Commission's interpretation is a reasonable one consistent with the intent of Congress, LaChance's first ground for relief is denied.

LaChance also argues that even if the Commission has the statutory authority to extend his original maximum term by forfeiting his whole parole time, it lost that authority by waiting too long to act and by misleading him.

Revocation of parole after unreasonable delay or under circumstances inherently misleading to the parolee

violates due process. See United States v. Hamilton, 708 F.2d 1412, 1415 (9th Cir. 1983). However, in the absence of "unfair tactics" by the Commission, and as long as the delay does not prejudice a parolee's ability to challenge the earlier violations, it is appropriate for the Commission to assess the "continuing nature" of a parolee's violations before initiating a revocation proceeding. White v. United States Parole Commission, 856 F.2d 59, 61 (8th Cir. 1988). See Cortinas v. United States Parole Commission, 938 F.2d 43, 45 (5th Cir. 1991) (parolee's four-year old conviction, previously used to alter the conditions of his parole, could be used as a ground for revocation in light of subsequent violations); United Sates v. Rice, 671 F.2d 455, 458 (11th Cir. 1982) (two and a half-year delay). See also

United States v. Shampang, 987 F.2d 1439, 1443 (9th Cir. 1993) (citations omitted):

> Absent prejudice, therefore, a delay motivated by a 'desire to utilize the rehabilitation process rather than abandon it' does not violate due process when the earlier violations are charged along with more recent ones because collectively they show 'that the further attempt at rehabilitation had not succeeded.'

Whether the delay between a violation of parole and the initiation of revocation proceedings is unreasonable may depend upon whether there was any deception on the part of the parolee. United Sates v. Tyler, 605 F.2d 851, 853 (5th Cir. 1979) (two-year delay unreasonable in the absence of deception). See also United States v. Sciuto, 531 F.2d 842, 847 (7th Cir. 1976) ("Whether the delay was unreasonable depends upon whether Sciuto deceived the probation officer.").

At the time of his sentencing, the Commission had no reason to believe that LaChance was using cocaine. Accordingly, it reasonably concluded that his 1988 conviction for careless driving and refusing to take a breath test was an isolated incident which required only a letter of reprimand. The Commission's reconsideration of that decision in light of the events which took place in 1992 was also reasonable. Given LaChance's four positive tests for cocaine, his acknowledgment of long term use and concealment of cocaine, and his disregard for treatment efforts, the earlier conviction justifiably could be viewed in 1992 as part of a series of parole violations stemming from illegal substance abuse.

In its February 11, 1993 decision directing that LaChance be admitted to

bail pending the Commission's final determination, this court stated the argument against forfeiture of LaChance's accumulated parole time as follows:

> The contemplated forfeiture of all of LaChance's parole time, from 1985 to 1992, would impose a second, and much more serious sanction for LaChance's 1988 conviction. It would go far beyond the possible consequences mentioned in the contemporaneous reprimand for that incident, which warned LaChance only that "continued disrespect and non-compliance with your conditions of release will result in your arrest and return to federal custody." Nothing in the letter indicated that the conviction (with its maximum term of fifteen days) might be used over four years later as an excuse for adding almost seven years to his term.
>
> The government's contention that it was appropriate for the Commission to wait and assess the cumulative effect of several violations before forfeiting LaChance's parole time is specious. The Commission may forfeit parole time only on the basis of a conviction which is punishable by a term of imprisonment. See 18 U.S.C. § 4210(b).

> Therefore, while failing a drug test, refusing to get drug treatment, missing an interview and leaving the district are violations which can support a revocation of parole, only LaChance's 1988 conviction could support the forfeiture. Even with his subsequent violations, at some point a prior conviction upon which the Commission had taken timely action may no longer serve as a basis for forfeiting all of a parolee's street time. Under the circumstances, it appears that LaChance has good grounds for expecting that the National Appeals Board will overturn the Commission's determination.

LaChance, 812 F. Supp at 438-39

Upon further reflection, further development by the parties of the facts and law, and particularly upon further disclosure of the dimensions of Mr. LaChance's concealment of his continuing abuse of cocaine, the court concludes that its earlier analysis does not adequately address this case. Had Mr. LaChance's (even then longstanding abuse of cocaine been known to the Commission

at the time of his 1988 conviction, the Commission could have revoked his parole then. As the situation developed thereafter, it would have admitted him to parole again at the appropriate time. It was deprived of its ability to respond flexibly and knowledgeably by Mr. LaChance's continuing concealment of the facts. Had the facts been openly disclosed, Mr. LaChance might well complain that the Commission's failure to take timely action then bars it from doing so now, after delay of many years. In light of his suppression of the facts, that argument is unavailing.

LaChance further argues that the letter of reprimand was misleading because it did not warn him of the possibility of losing his time spent on parole. This circuit, however, does not require notice of the loss of street

time: a parole violator automatically forfeits his street time when his parole is revoked on the basis of an offense punishable by imprisonment, detention or incarceration in any penal facility. D'Amato v. United States Parole Commission, 837 F.2d 72, 78 (2d Cir. 1988); Miller v. Hadden, 811 F.2d 743, 747 (2d Cir. 1987) ("the denial of credit for the time he had spent on parole was required by published regulation of the Commission").

The letter of reprimand did not suggest that the conviction would never be considered in the future. It specifically warned LaChance that "continued disrespect and non-compliance with your conditions of release will result in your arrest and return to federal custody. Your Probation Officer has received a copy of this letter and

will inform us immediately should any further violations occur." LaChance has not alleged that the lapse of time prejudiced his ability to challenge the earlier violation, or to produce evidence of mitigating circumstances. See White, 856 F.2d at 61.

Because the delay was not unreasonable in light of new violations, and the circumstances were not misleading, the Commission's decision to include the 1988 conviction in parole revocation proceedings was not an abuse of discretion.

CONCLUSION

The clerk of the court is directed to dismiss the petition.

So ordered.

Appendix D

Statute Involved

The Parole Reorganization Act of 1975, 18 U.S.C. § 4210(b)(2) provides, in relevant part, that:

> "(2) in the case of a parolee who has been convicted of any criminal offense committed subsequent to his release on parole, and such offense is punishable by a term of imprisonment, detention or incarceration in any penal facility, the Commission shall determine, in accordance with the provisions of section 4214(b) or (c), whether all or any part of the unexpired term being served at the time of parole shall run concurrently of consecutively with the sentence imposed for the new offense, but in no case shall such service together with such time as the parolee has previously served in connection with the offense for which he was paroled, be longer than the maximum term for which he was sentenced in connection with such offense."

APPENDIX E

REGULATION INVOLVED

28 C.F.R. § 2.52(c)(2) provides, in relevant part, that:

> "(c) A parolee whose release is revoked by the Commission will receive credit on service of his sentence for time spent under supervision, except as provided below:
>
> . . . .
>
> (2) It is the Commission's interpretation of 18 U.S.C. 4210(b)(2) that, if a parolee has been convicted of a new offense committed subsequent to his release on parole, which is punishable by any term of imprisonment, detention, or incarceration in any penal facility, forfeiture of time from the date of such release to the date of execution of the warrant is an automatic statutory penalty, and such time shall not be credited to the service of the sentence. An actual term of confinement or imprisonment need not have been imposed for such conviction; it suffices that the statute under which the parolee was convicted permits the trial court to impose any term of confinement or imprisonment in any penal facility. . . ."